JYE TAI PRECISION INDUSTRIAL (M) SDN BHD A

v.

VICTORIA ARULSAMY

COURT OF APPEAL, PUTRAJAYA B
JAMES FOONG JCA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: A-02-390-2002]
8 OCTOBER 2007 C

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Award of Industrial Court - Whether tainted with illegality, irrationality or impropriety - High Court examined substance of award and opted for different conclusion - Whether unwarranted - Whether treating review as an appeal - Industrial Relations Act 1967, ss. 20(3), 30(5)* D

LABOUR LAW: *Dismissal - Representation - Industrial Court affirming order of dismissal - Award quashed by order of certiorari - Whether Industrial Court committed judicial impropriety - Whether High Court erred in granting certiorari - Industrial Relations Act 1967, ss. 20(3), 30(5)* E

The appellant/employer had terminated the respondent's service for reason that she was involved in a fight with a co-worker at the workplace and had committed a misconduct that warranted her F dismissal. The Industrial Court, having heard the respondent's representation under s. 20(3) of the Industrial Relations Act 1967 ('the Act'), ruled that the dismissal was justified and so dismissed the representation ('the award'). The respondent applied to the High Court for an order of *certiorari* to quash the award, whereof G the learned Judicial Commissioner ('JC'), upon a perusal of the substance of the award, quashed the same and ordered for the payment of compensation *in lieu* of reinstatement to the respondent. It was the further view of the JC, in finding thus, that the Industrial Court, in referring to Halsbury's Laws of Malaysia H for the meaning of 'misconduct', had applied the common law principles in arriving at the award instead of the statutory principles contained in s. 20 of the Act. Dissatisfied, the appellant appealed and raised the following issues for the appellate court's consideration, namely: (i) whether the decision making process of I the Industrial Court was tainted with judicial impropriety; (ii)

whether the Industrial Court had applied the right principle of law; and (iii) whether the High Court could properly and rightfully examine the substance of the Industrial Court's decision.

Held (allowing the appeal)

Per James Foong JCA delivering the judgment of the court:

(1) There are now certain limited exceptions where judicial review may extend to substance of the decision and not just the judicial making process. This, as can be observed from *R Rama Chandran v. The Industrial Court of Malaysia & Anor*, covers situations where there is illegality, irrationality or proportionality. Thus, to enter into this arena the High Court must be satisfied that the case falls within the stated exceptions. (paras 6 & 9)

(2) On the authority of *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor*, the proceedings conducted in the Industrial Court gave rise to no impropriety in the judicial making process. There is no evidence that the Industrial Court had over stepped its jurisdiction or had committed an illegality. (para 9)

(3) As the issue before the Industrial Court concerned an allegation of an employee in breach of a term and condition in her contract of employment due to misconduct, it is pertinent that the Industrial Court should first determine the meaning of 'misconduct'. Consequently, the High Court ought not to have faulted the Industrial Court for referring to Halsbury's Laws of Malaysia. In order to arrive at the decision whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounts to misconduct. Thus it is essential to ascertain what misconduct amounts to and to do so reference should be made to case law as well as reputable texts. Such an approach was approved by the Federal Court in *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* and the Industrial Court, therefore, had applied the correct principle of law. (paras 13-16)

(4) Having ascertained what misconduct amounted to, the Industrial Court in this case proceeded to make a finding that the respondent had breached category III of the appellant's Rules and Regulations which prohibits "fighting within the Companies premises" and which makes those in breach "liable

to disciplinary action including suspension without pay and termination of employment". There is nothing adverse about this finding as the respondent was indeed involved in a fight with another employee of the appellant. It does not really matter who started the fight or whether the respondent was provoked into it, as the fact remains that the respondent had breached the appellant's Rules and Regulations by fighting with another employee in the company's car park. Hence, there is no irrationality in the Industrial Court award to warrant the High Court to examine the substance of the decision or return a different conclusion therefrom. (para 18)

(5) The third exception of proportionality likewise does not apply to the facts of this case. It follows therefore that none of the exceptions applies as to warrant the High Court to venture further than to examine the judicial making process of the Industrial Court. Clearly, the JC had erred in her approach in reviewing the award the way she did. She had erroneously treated the review as if it was an appeal from subordinate courts, and exercised her own discretion over the facts of the case when such exercise is preserved for the Chairman of the Industrial Court. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/majikan telah menamatkan perkhidmatan responden atas alasan bahawa responden terlibat dengan pergaduhan dengan seorang rakan kerja di tempat kerjanya dan telah melakukan suatu salahlaku yang membolehkan beliau dibuang kerja. Mahkamah Perusahaan, setelah mendengar representasi responden di bawah s. 20(3) Akta Perhubungan Perusahaan 1967 ('Akta'), memutuskan bahawa pembuangan kerja adalah adil dan dengan itu telah menolak representasi ('award'). Responden memohon perintah certiorari bagi membatalkan award, dan yang arif Pesuruhjaya Kehakiman ('PK'), setelah memeriksa isi award, membatalkan award dan memerintahkan pembayaran pampasan sebagai ganti pengambilan semula kepada responden. Adalah menjadi pandangan PK seterusnya, dalam mencapai keputusannya itu, bahawa Mahkamah Perusahaan, dalam merujuk kepada Halsbury's Laws of Malaysia untuk makna 'salahlaku', telah menggunapakai prinsip undang-undang common dalam mencapai award dan tidak prinsip-prinsip statutori yang terkandung di dalam s. 20 Akta. Tidak berpuashati, perayu merayu dan membangkitkan persoalan-persoalan berikut untuk pertimbangan Mahkamah Rayuan, iaitu: (i)

A sama ada wujud ketidakteraturan pada proses membuat keputusan Mahkamah Perusahaan; (ii) sama ada Mahkamah Perusahaan menggunapakai prinsip undang-undang yang betul; dan (iii) sama ada Mahkamah Tinggi boleh dan berhak untuk memeriksa isi keputusan Mahkamah Perusahaan.

B

Diputuskan (membenarkan rayuan)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

C **(1)** Kini terdapat beberapa kecualian di mana semakan kehakiman boleh diarahkan kepada isi keputusan dan bukan semata-mata proses membuat keputusan. Ini, seperti yang terserlah dari keputusan di dalam *R Rama Chandran v The Industrial Court of Malaysia & Anor*, merangkumi keadaan-keadaan di mana terdapat 'illegality, irrationality atau proportionality'. Oleh itu, D untuk menerjuni ke arena ini, Mahkamah Tinggi hendaklah mempastikan bahawa kes dirangkumi oleh pengecualian yang dikatakan.

(2) Atas autoriti *Bumiputra Commerce Bank Bhd v. Mahkamah* E *Perusahaan Malaysia & Anor*, prosiding yang dilaksanakan di Mahkamah Perusahaan tidak membangkitkan sebarang ketidakteraturan pada proses membuat keputusan. Tiada keterangan bahawa Mahkamah Perusahaan telah melampaui bidangkuasanya atau telah melakukan suatu illegality.

F

(3) Oleh kerana isu di hadapan Mahkamah Perusahaan adalah mengenai alegasi terhadap seorang pekerja yang dikatakan melanggar terma dan syarat kontrak perkhidmatannya disebabkan oleh salahlaku, maka adalah berkaitan bahawa G Mahkamah Perusahaan harus terlebih dahulu mempastikan apakah yang dimaksudkan dengan 'salahlaku'. Oleh yang demikian, Mahkamah Tinggi tidak sayugianya menyalahkan Mahkamah Perusahaan kerana merujuk kepada Halsbury's Laws of Malaysia. Bagi mencapai keputusan sama ada H responden telah dibuang kerja tanpa alasan yang adil dan munasabah, Mahkamah Perusahaan hendaklah terlebih dahulu memutuskan sama ada perbuatan responden merupakan suatu salahlaku. Oleh itu adalah penting untuk menentukan apa yang dimaksudkan dengan salahlaku dan untuk itu rujukan harus I dibuat kepada undang-undang kes serta teks-teks yang berwibawa. Pendekatan sebegini dibenarkan oleh Mahkamah

Persekutuan di dalam *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* dan Mahkamah Perusahaan, dengan itu, telah menggunapakai prinsip undang-undang yang betul. A

(4) Setelah memutuskan mengenai maksud salahlaku, Mahkamah Perusahaan dalam kes ini membuat dapatan selanjutnya bahawa responden telah melanggar kategori III Perintah dan Peraturan perayu yang melarang pekerjanya "bergaduh di kawasan premis Syarikat" sekaligus menyebabkan mereka yang terlibat "tertakluk kepada tindakan disiplin termasuk digantung kerja tanpa gaji dan ditamatkan perkhidmatannya". Tiada salahnya dengan dapatan ini kerana responden sememangnya terlibat dengan pergaduhan dengan seorang pekerja perayu yang lain. Siapa yang memulakan pergaduhan atau sama ada responden telah diprovokasi adalah tidak penting kerana faktanya masih lagi bahawa responden telah melanggar Perintah dan Peraturan dengan bergaduh dengan seorang pekerja lain di tempat letak kereta syarikat. Oleh yang demikian, tidak wujud irrationality pada award Mahkamah Perusahaan bagi membolehkan Mahkamah Tinggi memeriksa isi keputusannya atau mengambil satu keputusan yang lain darinya. B C D E

(5) Pengecualian ketiga, proportionality, juga tidak terpakai kepada fakta kes di sini. Ianya mengikut bahawa tiada satupun dari pengecualian terpakai bagi membolehkan Mahkamah Tinggi menerokai lebih jauh daripada hanya memeriksa proses membuat keputusan Mahkamah Perusahaan. Jelas bahawa PK khilaf pada pendekatannya dalam menyemak award. Beliau khilaf kerana melayani semakan seolah-olah ianya satu rayuan dari mahkamah rendah, dan kerana melaksanakan budibicaranya terhadap fakta-fakta di mana pelaksanaan budibicara itu terkhusus untuk Pengerusi Mahkamah Perusahaan. F G

Case(s) referred to:

Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77 HC ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)*** H

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181 FC ***(refd)*** I

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(3)

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol. 7, pp. 120.090 - 120.0921

For the appellant - Yee Seu Kai (V Modeshanantham with him); M/s Yee, Nantham, Leong & Partners
For the respondents - Kuthiah Arunasalam; M/s Ku & Partners

[Appeal from High Court, Ipoh; Judicial Review Application No: 25-20-2001]

Reported by WA Sharif

JUDGMENT

James Foong JCA:

Introduction

[1] We heard this appeal on 23 January 2007, and unanimously dismissed it with costs. We now give our reasons. Before we do so, the following are the brief facts of the case.

Facts

[2] The respondent was at all material time an employee of the appellant. She was then 47 years of age and had been with the appellant for 11 years before she was dismissed on 6 June 1999. The reason for her dismissal was that she was found fighting with another employee of the appellant on 15 June 1999 in the appellant's premises. This other employee was none other than her own niece, Julie, who was then 17 years of age. Julie was also dismissed by the appellant. Before dismissing the respondent, the appellant held a domestic inquiry that found her in breach of the appellant's rules and regulations of employment and recommended her dismissal. Dissatisfied with this decision, the respondent made representation under s. 20(3) of the Industrial Relations Act 1967 ("the Act") for reinstatement to her former position without loss of service and seniority with back wages, allowances, commissions, benefits and privileges, or, alternatively for loss of wages as compensation *in lieu* of reinstatement. This representation was eventually referred to the Industrial Court for an award. When the Industrial Court dismissed the respondent's representation, she applied to the High Court for judicial review seeking for an order

of *certiorari* to quash the award of the Industrial Court. This was allowed with a direction that the matter be remitted back to the Industrial Court to consider the amount of compensation in lieu of reinstatement to be paid to the respondent. The appellant, dissatisfied with this outcome, appealed to us.

Our Reasons

[3] We approach this appeal by first examining whether the learned judicial commissioner had applied the correct principle of law in conducting the judicial review. It is well established in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 that:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing abuse of power, be itself guilty of usurping power.

[4] This approach was adopted by the Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; where Jemuri Serjan SCJ (as he then was) said:

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition ...

(and at p. 887)

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute '*de novo*' and decide it on its merits.

[5] This approach was once again repeated by us in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 where Mohd Ghazali Yusoff JCA advised (at p. 526):

> From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, *inter alia*, in the forefront of his mind:
>
> (i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

A (ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this
B would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

C (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds
D constitute just cause or excuse for the dismissal;

(v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;

E (vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not
F that of the High Court.

[6] However, there are now certain limited exceptions where the review extends to substance of the decision and not just the judicial making process. This can be observed from the judgment
G of Edgar Joseph Jr. FCJ in Federal Court decision of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 which, in our view, covers situations where there is either illegality, irrationality and perhaps proportionality. Illegality concerns whether the authority or body whose decision is being impugned
H has kept within the parameters of its powers. Irrationality is where a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. And proportionality is in this example cited "there are cases in the
I United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has been recognized

as a general principle of English law, and when applied, it enables the court to review an impugned decision for substance as well as process". A

[7] In allowing the order for *certiorari* in this instant case, the learned judicial commissioner first accused the Industrial Court of applying common law principles in arriving at the award "instead of the statutory principles contained in s. 20 of the Act". Then, she dwelled in-depth into the evidence adduced in the Industrial Court particularly extracts from the domestic inquiry and came to a conclusion that there is no positive evidence to implicate the respondent as the person who started the fight with Julie. From there, she proceeded to find that no opportunity was accorded to the respondent to cross examine Julie during the domestic inquiry, and the Industrial Court had just accepted the evidence of the appellant and the notes taken at the domestic inquiry to come to a decision. She then accused the Industrial Court for holding that it was upon the respondent to call as her witness, one Maliga, a production line leader in her sector in the factory, to fortify her claim that before the incident the respondent had reported to Maliga that Julie was provoking her. In conclusion, the learned judicial commissioner said that "in view of the large number of workers employed by the employer to wit, 420, and the serious injuries which were suffered by both the applicant and Julie, which caused both of them to faint and the applicant to be hospitalized for two days, the court felt that the reinstatement of the applicant was not appropriate despite her long service of 11 years. In the premises, the court ordered that the matter be remitted back to the 1C to consider the amount of compensation in lieu of reinstatement to be paid to the applicant". To justify her decision in evaluating the substance of the decision of the Industrial Court, the learned judicial commissioner cited *R Rama Chandran v. The Industrial Court of Malaysia & Anor (supra)*. B C D E F G

[8] Before we consider whether the learned judicial commissioner was qualified to review the substance of the Industrial Court award, let us first examine whether there was judicial impropriety in the judicial making process of the Industrial Court in coming to the award. H

[9] At the hearing in the Industrial Court, witnesses for the appellant as well as the respondent were called. They were cross-examined. The notes taken at the domestic inquiry were also admitted and following *Bumiputra Commerce Bank Bhd v.* I

Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77 "where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a *prima facie* case against the employee". Adopting this approach we find that the Industrial Court had not erred in holding that it was the duty of the respondent to call her witness, Maliga. From our observation of the proceedings conducted in the Industrial Court we detected no impropriety in the judicial making process.

[10] Now we shall deal with the issue of whether the High Court can proceed to examine the substance of the Industrial Court's decision. To enter into this arena, the High Court must be satisfied that the case falls within the stated exceptions enumerated in *R Rama Chandran v. The Industrial Court of Malaysia & Anor (supra)*.

[11] First we look at illegality ie, whether the Industrial Court had kept strictly within the parameters of its powers. We find no evidence that the Industrial Court had over stepped its jurisdiction in this instant case and neither did the High Court make any accusation of this either.

[12] Second, is irrationality, where the award is so outrageous in defiance of logic or of accepted moral standard that no sensible person who has applied his mind to the question could have arrived at such a decision.

[13] The first consideration for this must be whether the Industrial Court has applied the right principle of law. As the issue before the Industrial Court concerned an allegation of an employee in breach of a term and condition in her contract of employment due to misconduct it is, in our view, pertinent that the Industrial Court must first determine the meaning of misconduct. To ascertain this, the learned Chairman of the Industrial Court referred to certain decided cases as well as *Halsbury's Laws of Malaysia*, vol. 7, at pp. 120.090 - 120.0921 which says:

> 'misconduct' connotes to conduct that is inconsistent with the fulfilment of the express or implied conditions of service. Some examples of types of misconduct are ... , wilfully disobeying lawful and reasonable orders or precedents, ...unprofessional conduct and breach of company policy ..., using violence on superior or co-employee.

[14] By referring to this, he is faulted by the High Court for applying common law principle rather than the "statutory principle" which is s. 20 of the Act. We find this view of the learned judicial commissioner rather strange since in order to arrive at the decision of whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounts to a misconduct. It is only when the impugned act is not a misconduct that the respondent can be successful in her representation under s. 20 of the Act. Thus, it is essential to ascertain what misconduct amounts to and to do so reference should be made to case law as well as reputable text whose opinions are mainly derived from principles enunciated from decided cases on this subject. In fact such approach was approved by the Federal Court in *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181 where at p. 194 Ahmad Fairuz FCJ (as he then was) declared:

> And the appeal now before us, as in *Wong Chee Hong*, is one that pertains to s. 20 IRA. As such we see nothing wrong in applying the common law principles to the issue of dismissal in the appeal now before us. That is what, after all, the Supreme Court did in *Wong Chee Hong*.

[15] And prior to this at p. 193 he said:

> In *Wong Chee Hong (supra)* the Supreme Court pointed out that s. 20 IRA is entirely different from para, (c) of s. 55(2) of the United Kingdom Protection of Employment Act 1978. Hence the Supreme Court, at p. 49 of the report said: " ... Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word 'dismissal' in our section 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle".

[16] From above, we are of the view that the Chairman of the Industrial Court had applied the correct principle of law in this case.

[17] Now onto the Industrial Court's appreciation of the facts. Was it so perverse that the award handed down is so outrageous that it defies logic or accepted moral standards in the sense that no sensible person who had applied his mind to the question to be decided could have arrived at it?

[18] Having ascertained that misconduct includes an act of non disciplinary behaviour or an action inconsistent with an express or implied condition of an employee's service, the Industrial Court found that the respondent had indeed breached category III of the appellant's Rules and Regulations which prohibits "fighting or striking another employee within the Companies premises", and if any employee is in breach of this condition, he or she would be "liable to disciplinary action including suspension without pay and termination of employment with or without notice". Here, the respondent was indeed involved in a fight with another employee of the appellant. It does not really matter who started the fight or whether she was provoked into it but the fact remains that she had breached the appellant's Rules and Regulations by fighting with another employee in the company's car park. Though the respondent had appealed to the appellant's management to be given another chance in view of her long service record, this was turned down when it was discovered that she had been previously warned by her supervisor not to repeat a similar sort of incident. Another reason why her appeal was rejected was because the appellant has a workforce of over 400 where discipline among the workers in the factory must be maintained. Based on these facts we do not detect any irrationality in the Industrial Court award to warrant the High Court to examine the substance of the decision and even if it did, to return a different conclusion from that of the Industrial Court.

[19] The learned judicial commissioner had criticized the approach adopted by domestic inquiry in failing to accord the respondent with an opportunity to cross examine Julie's witnesses. This she said would amount to deprivation of natural justice. But let us be reminded that under s. 30(5) of the Act, "The court shall act in according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form" when making an award. When this applies to Industrial Court's proceedings then more so it should be to domestic inquiry which, in this case, was set up to inquire into the incident, and as long as all parties were given an opportunity to present their case and their versions duly considered by the panel then its finding cannot be said to be inequitable.

[20] As for the third exception of proportionality we do not find the facts of this case fit the example illustrated. This exception therefore does not apply.

[21] Since none of the exceptions applies in this case to warrant the High Court to venture further than to examine the judicial making process rather than the substance of the award, we find that the learned judicial commissioner had erred in her approach in reviewing this award the way she did. She had erroneously approached the judicial review as if it was an appeal from the Subordinate Courts and had exercised her own discretion over the facts of the case which is preserved for the Chairman of the Industrial Court.

Conclusion

[22] It was for the reasons stated above that we allowed the appeal with costs to the appellant here and below.